



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
2 NAVY ANNEX  
WASHINGTON DC 20370-5100

BJG  
Docket No: 3458-00  
28 August 2000

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: LTCOL [REDACTED], USMC [REDACTED]  
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

- Encl:
- (1) DD Form 149 dtd 4 Feb 00 w/attachment
  - (2) HQMC PERB memo dtd 11 May 00 w/encl
  - (3) Copy of fitrept for 1 Aug 98 - 31 Jul 99
  - (4) HQMC MMOA-4 memo dtd 5 May 00
  - (5) Counsel ltr dtd 7 Jun 00 w/encl
  - (6) Memo for record dtd 14 Jun 00
  - (7) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected by removing three fitness reports, for 11 June to 31 October 1994, 1 November 1994 to 31 January 1995, and 1 February to 25 May 1995 (copies at Tabs A through C, respectively). As indicated in enclosure (2), the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) has directed removal of all three reports. Petitioner further requested removal of his failure of selection by the Fiscal Year (FY) 2000 Lieutenant Colonel Selection Board. Finally, he requested that the date of rank and effective date of his promotion to lieutenant colonel be changed to reflect selection by the FY 2000 Lieutenant Colonel Selection Board, vice the FY 2001 Selection Board. He was promoted to lieutenant colonel with a date of rank and effective date of 1 July 2000.

2. The Board, consisting of Messrs. Frankfurt, Ivins, and Zarnesky, reviewed Petitioner's allegations of error and injustice on 15 June 2000, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures (less enclosure (3)), naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. All three contested fitness reports were for the same assignment, with the same reporting senior (RS) and reviewing officer (RO). The first two documented Petitioner's service as a captain, pay grade O-3; the last covered service as a major, pay grade O-4.

c. The contested fitness report for 11 June to 31 October 1994 (Tab A) marked Petitioner "OS" (outstanding), the highest possible, or "NO" (not observed) in all categories, except item 14l ("personal relations"), where he was marked "EX" (excellent), the second highest. In "general value to the service," he and the other captain with whom he was compared were marked "OS," but he was ranked below his peer. The RS comments were positive, except for the following:

...

[Petitioner] needs to pay particular attention to block "14L" personal relations, an otherwise superior officer he runs the risk of rendering himself ineffective without improvement in this area...

The RO indicated that he had only limited opportunity to observe Petitioner, but concurred with the mark and ranking assigned by the RS in "general value to the service." His additional comments were positive, except for the following:

...Such palpable self-assuredness and self-sufficiency have the unfortunate (and unintentional) tendency to put others "off" just a bit. I suspect this is not a novel observation. It's certainly not intended as a "shot"--it's just the way he is...I concur specifically in the marking in "personal relations."...He should go far. But if he doesn't, my hunch is block 14l will be the only answer. He knows this, and to his credit, he's working on it.

d. The contested fitness report for 1 November 1994 to 31 January 1995 (Tab B) marked Petitioner "OS" or "NO" in all categories, except item 14l, in which he was again marked "EX". In "general value to the service," he was again second of two captains marked "OS." The RS comments were positive, except for the following:

...He is working to improve in the area of Personal Relations...

The RO concurred with the mark and ranking assigned by the RS in "general value to the service." His additional comments were positive, except for the following:

...whose acerbic manner diminishes appreciably his overall effectiveness. In a people-intensive organization such as ours, he really needs to apply himself in this critical area. He knows this. The point has been driven home by me and his [RS]. We only want to see [Petitioner] fulfill his tremendous potential...

e. The contested fitness report for 1 February to 25 May 1995 (Tab C) marked Petitioner "OS" or "NO" in all categories. In "general value to the service," he was fourth of five majors marked "OS." The RS comments were positive, except for the following:

...I am particularly proud of his efforts in the area of personal relations, a noted weak link in his armor. He has made noticeable improvement and I expect he will continue to pay attention in this important area...

The RO indicated that he did not concur with the ranking the RS assigned in "general value to the service," and stated that he would rank him second rather than fourth of five. He added the following comments:

I do not concur in the ranking of officers. Junior-most among those listed above, [Petitioner] may be "senior-most" in terms of brainpower and "ability in the abstract." In my considered opinion, he should be ranked #2 of 5 among this group of officers.

The [RS]'s endorsement for school selection, absent an accompanying affirmative recommendation for future command selection, reflects the "personal relations" chink in this officer's armor. He is so bright and so capable that he should succeed as a Marine officer. Absent continued improvement in the way he "rubs" others, however, this conspicuously talented officer may be better suited to the most demanding positions of staff responsibility than he is to command. In my estimation, he would be a superb acquisition manager or strategic planner--both assignments requiring superior brainpower and analytical "smarts." [Emphasis in original]

f. Petitioner failed before the FY 2000 Lieutenant Colonel Selection Board, which convened on 9 November 1998 and adjourned 9 December 1998. The FY 2001 Selection Board, before which he was successful, convened on 19 October 1999 and adjourned 8 November 1999.

g. The uncontested portion of Petitioner's fitness report record as it stood before the FY 2000 Selection Board reflected generally "OS" marks, with a smattering of "EX" marks, before he became a major, and straight "OS" marks as a major.

h. As shown in enclosure (2), the HQMC PERB directed removal of all three contested fitness reports. By letter of 28 April 2000, well after the FY 2001 Selection Board had adjourned on 8 November 1999, Petitioner was advised that the reports were to be removed at some time in the future.

i. In correspondence attached as enclosure (4), the HQMC Officer Career Counseling and Evaluation Section, Officer Assignment Branch, Personnel Management Division

(MMOA-4), the office having cognizance over the subject matter of Petitioner's request to strike his failure of selection for promotion, has commented to the effect that this request should be denied. This advisory opinion included the following:

2...we reviewed [Petitioner]'s record and petition. He failed selection on the FY00 [2000] USMC Lieutenant Colonel Selection Board. Subsequently, he was selected for Lieutenant Colonel on the FY01 [2001] Board from above the primary zone. Note, this was prior to the relief granted by the [PERB]...

3. In our opinion, the record was *no more competitive* [emphasis in original] as it appeared before the FY01 Board than when it appeared before the FY00 Board. Both Boards were able to review and evaluate [Petitioner]'s record and decide whether it was the best and most fully qualified in relation to the other records considered by that particular board. Therefore, being selected by the FY01 Board from above the primary zone with substantially the same record, i.e. an additional fitness report, does not imply that he did not receive a complete and fair evaluation by the FY00 Board...

j. Enclosure (5) is Petitioner's counsel's rebuttal to the MMOA-4 advisory opinion. He stated that Petitioner was selected for promotion in an above-zone status by the FY 2001 Lieutenant Colonel Selection Board, and that selection opportunity in this status is "substantially reduced." He argued that in accordance with recent case law, this Board must grant removal of the failure of selection unless they find that his promotion with a corrected record "was definitely unlikely." He contended that MMOA-4 failed to apply this standard. Counsel included a copy of the order of the United States Court of Federal Claims in the case of Cunningham v. United States, which discusses the "definitely unlikely" standard adopted in Engels v. United States, 230 Ct. Cl. 465 (1982).

k. The memorandum for the record at enclosure (6) shows the HQMC Promotion Branch (MMPR) has verbally advised that had Petitioner been selected by the FY 2000 Lieutenant Colonel Selection Board, he would have been assigned a date of rank and effective date of 1 March 2000.

4. The FY 2001 promotion board received one fitness report on Petitioner, for 1 August 1998 to 31 July 1999, which had not been available to the FY 2000 board. A copy is at enclosure (3). Petitioner's counsel forwarded this copy after the Board had considered his client's case. The report is not in Petitioner's Official Military Personnel File; however, he provided it by means of correspondence with the promotion board. It shows one mark of "F" (second best), in "performance"; five of "E" (third best), in "effectiveness under stress," "initiative," "setting the example," "professional military education," and "judgment"; and seven of "D" (fourth best), in "proficiency," "courage," "leading subordinates," "developing

subordinates," "ensuring well-being of subordinates," "communication skills" and "decision making ability." The RS comments were positive in all respects. In the RO's "comparative assessment," Petitioner was marked in the fourth highest block, as "one of the many highly qualified professionals who form the majority of this grade." The RO stated "This report is not inflated." The first and third sentences of the RO comments, which were otherwise positive, referred to Petitioner's failure of selection as follows:

This is a special case that requires the strongest reconsideration for promotion...I have known [Petitioner] for many years and I am shocked that he was not promoted last year...as are the CINC [Commander in Chief] and other GO [General Officer]/Flag Officers at USFK [United States Forces Korea].

These references to Petitioner's failure of selection violate the applicable fitness report directive, Marine Corps Order P1610.7E, paragraph 4012.5.g, which includes in its list of "Unacceptable Comments" "Reference to prior nonselection for promotion which is a matter of record." The Board's staff will advise Petitioner's counsel that the HQMC Personnel Management Support Branch (MMSB) has not received the fitness report, and that he should ask the RO to forward the report to MMSB after the RO has deleted his unauthorized references to Petitioner's failure of selection.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding enclosure (4), the Board finds the existence of an injustice warranting the requested relief.

The Board finds that Petitioner's failure of selection by the FY 2000 Selection Board should be removed. In this connection, they agree with Petitioner's counsel as to the applicable law. They recognize that the FY 2000 and 2001 promotion boards reviewed substantially the same record, except that the FY 2001 board had one more fitness report. However, from their review of Petitioner's record as it would have stood before the FY 2000 Selection Board without the contested fitness reports, the Board is not prepared to find that his selection would have been "definitely unlikely" with a corrected record.

The Board is satisfied that if Petitioner had appeared before the FY 2000 Selection Board without the damaging reports at issue, he probably would have been selected. In this regard, they note his record was good enough to permit his selection in spite of the contested reports and his failed of selection status. They did not speculate as to what, if any, role the additional fitness report available to the FY 2001 board played in Petitioner's selection. In light of the above, and the information provided at enclosure (6), they find Petitioner's lieutenant colonel date of rank and effective date should be backdated to 1 March 2000.

In view of the foregoing, the Board recommends the following corrective action.

## RECOMMENDATION:

a. That Petitioner's record be corrected by removing his failure of selection by the FY 2000 Lieutenant Colonel Selection Board.

b. That Petitioner's record be further corrected, where appropriate, to show his date of rank and effective date in the grade of lieutenant colonel as 1 March 2000, the date he would have been assigned had he been selected by the FY 2000 Lieutenant Colonel Selection Board; and that his lineal precedence be adjusted accordingly.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

5. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder

*Jonathan S. Ruskin*  
JONATHAN S. RUSKIN  
Acting Recorder

6. The foregoing report of the Board is submitted for your review and action.

*W. Dean Pfeiffer*  
W. DEAN PFEIFFER  
By direction

Reviewed and approved:

*Joseph G. Lynch* 10-12-00

Joseph G. Lynch  
Assistant General Counsel  
(Manpower & Reserve Affairs)



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3280 RUSSELL ROAD  
QUANTICO, VIRGINIA 22134-5103

3458-00

IN REPLY REFER TO:

1610  
MMER  
11 May 00

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF [REDACTED]  
[REDACTED] USMC

Encl: (1) Copy of CMC ltr 1610 MMER/PERB of 28 Apr 00  
(2) CMC Advisory Opinion 1600 MMOA-4 of 5 May 00

1. As evidenced by enclosure (1), PERB removed from [REDACTED] official military record, the fitness reports for the periods 940611-941031 (AN), 941101-950131 (GC), and 950201-950525 (CH).

2. We defer to BCNR on the issue of [REDACTED]'s request for the removal of his failure of selection and adjustment of date of rank. Enclosure (2) is furnished to assist in resolving that matter.

[REDACTED]  
Head, Performance Evaluation  
Review Branch  
Personnel Management Division  
By direction of the Commandant  
of the Marine Corps



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3280 RUSSELL ROAD  
QUANTICO, VIRGINIA 22134-5103

345800

IN REPLY REFER TO:  
1610  
MMER/PERB  
28 APR 2000

From: Commandant of the Marine Corps  
To: Major [REDACTED] USMC  
[REDACTED]

Subj: CORRECTION OF NAVAL RECORD

Ref: (a) MCO 1610.11C

1. Per the reference, the Performance Evaluation Review Board has reviewed allegations of error and injustice in your Naval record. Having reviewed all the facts of record, the Board has directed that your Naval record will be corrected by removing therefrom the following fitness reports:

<u>Date of Report</u>	<u>Reporting Senior</u>	<u>Period of Report</u>
13 Dec 94	LtCol [REDACTED]	940611 to 941031 (AN)
27 Feb 95	LtCol [REDACTED]	941101 to 950131 (GC)
8 Jun 95	LtCol [REDACTED]	950201 to 950525 (CH)

2. There will be inserted in your Naval record a memorandum in place of the removed reports. The memorandum will contain appropriate identifying data concerning the reports and state that they have been removed by direction of the Commandant of the Marine Corps and cannot be made available in any form to selection boards and reviewing authorities. It will also state that such boards may not conjecture or draw any inference as to the nature of the reports or the events which may have precipitated them, unless such events are otherwise properly a part of the official record. The Automated Fitness Report System (the data base which generates your Master Brief Sheet) will be corrected accordingly.

3. The Commandant of the Marine Corps is not empowered to grant or deny the removal of failure(s) of selection from a Naval record. Accordingly, your case will be forwarded to the Board for Correction of Naval Records (BCNR) for consideration of that issue.

[REDACTED]  
D. [REDACTED] SEN  
By direction





DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3280 RUSSELL ROAD  
QUANTICO, VIRGINIA 22134-5103

3458-06

IN REPLY REFER TO:  
1600  
MMAA-4  
5 May 00

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: BCNR PETITION FOR [REDACTED]  
[REDACTED] USMC

Ref: (a) MMER Request for Advisory Opinion in the case of  
[REDACTED] L [REDACTED] USMC  
of 28 Apr 00

1. Recommend disapproval of [REDACTED]'s petition to remove his failure of selection and backdate his date of rank.
2. Per the reference, we reviewed [REDACTED]'s record and petition. He failed selection on the FY00 USMC Lieutenant Colonel Selection Board. Subsequently, he was selected for Lieutenant Colonel on the FY01 Board from above the primary zone. Note, this was prior to the relief granted by the Performance Evaluation Review Board. He requests removal of his failure of selection and backdating his date of rank.
3. In our opinion, the record was *no more competitive* as it appeared before the FY01 Board than when it appeared before the FY00 Board. Both Boards were able to review and evaluate Major [REDACTED] record and decide whether it was the best and most fully qualified in relation to the other records considered by that particular board. Therefore, being selected by the FY01 Board from above the primary zone with substantially the same record, i.e. an additional fitness report, does not imply that he did not receive a complete and fair evaluation by the FY00 Board.
4. In summary, we believe that [REDACTED]'s petition is without merit. Therefore, we recommend disapproval of his petition to remove his failure of selection and backdate his date of rank.

[REDACTED]

[REDACTED]  
Lieutenant Colonel, U. S. Marine Corps  
Head, Officer Career Counseling and  
Evaluation Section  
Officer Assignments Branch  
Personnel Management Division